The Madras Law Journal.

VOL. XXII.] APRIL, 1912. [PART XII.

"THE HINDU LAW OF ADOPTION AND ITS EVOLUTION."

Mr. Golap Chandra Sircar in his learned Tagore Law Lectures on the Law of Adoption observes: "The usage of adoption is the survival of an archaic institution which owed its origin to the principle of slavery, whereby a man might, like the lower animals, be the subject of dominion or proprietory right." (*The Law of Adoption*, Lecture I, page 1.) Mr. Mayne, in his learned Treatise on "Hindu Law and Usage" which justly holds the field as a standard authority on the subject, says: "One might read through all the texts from the Sutra writers down to the Dayabhaga without discovering that adoption is a matter of any prominence in the Hindu system." (*Hindu Law and Usage*: Sixth Edition, p. 127). With due deference to the high authority of the above learned authors, it may be confidently asserted that the above statements are far from being accurate. A historical study of the chief Smriti writers and of the commentators who followed them will clearly convince the reader that the practice of adoption did not originate in the baneful institution of slavery. He will also note that the custom of adoption was the most potent factor in freeing early Hindu society from many of its most degenerating practices and in raising Hindu family life to such a pitch of domestic purity as is excelled in no other system in the world. To bring home the truth of the above remarks, one has only to glance at the conception of life which influenced the early Aryan mind. It regarded this world as only a stage in which each should play his part and leave a strict account of his temporal and spiritual affairs to his successor. A consciousness of this indebtedness made him feel burdened with a three-fold obligation to the Rishis, to the Gods and to the Manes जायमानोवै ब्राह्मणस्त्रिभिर्ऋणवाजायते ब्रह्मचर्येणर्षिभ्यः यज्ञेनदेवेभ्यः प्रजयापितृभ्यः एषाअनृणोयः

पुत्रोयज्वा ब्रह्मचारिवासो." (A Brahmin is born burdened with three debts. He owes the study of the Vedas to the Rishis; Sacrifices to the Gods; a Son to the Manes; therefore he is free from debt who has begotten a son, who has offered sacrifices, and who has lived as a student with a teacher."—Taittiriya Samhita VI, 3 10, 5; Satapatha Brahmana 1, 7, 2, 11; Vasishta, Ch. XI, 48.) The conception reaches its climax when at the sense of approaching dissolution, our forefathers said : "त्वंब्रह्मत्वंयज्ञस्त्वंलोकइति । सपुत्रः प्रत्याह अहं ब्रह्म अहं लोक अहं यज्ञः" ("You are Brahma, you are Yagna, you are the Loka.") The son answers : "I am Brahma (I shall study the Vedas). I am Yagna (I shall perform the Yagnas.) I am the Loka, *i. e.*, I shall, by begetting a son, conquer the world of men (मनुष्यलोकः) ; by performing meritorious works conquer the world of ancestors and by learning conquer the world of Gods."—Sathapatha Brahmana, 14, 4, 3, 25). A son was therefore imperatively necessary to secure future beatitude. ("नापुत्रस्यलोकोऽस्ति इति"). "There are no heavenly regions for the sonless man," so enjoins Aiteraya Brahmana. To heighten the imperiousness of male desires, the physiological identity of the son with the father was also assumed as is apparent from the following verse : "आत्माहिजज्ञ आत्मनः (Self is born from self). Aiteraya Brahmanam. अङ्गात् अङ्गात्संभवति हृदयादधिजायसे । आत्मावैपुत्र नामासिसजीवशारदः शतम् ।। From the several limbs (of my body) art thou produced, from my heart art thou born, thou art self called a son; mayst thou live a hundred Autumns. (Samaveda Mantra Brahmana P. 1, K. 5, 17.) Here is indeed a clear indication that the guiding principle of the Hindu Law of Inheritance is kinship and not spiritual benefits, and when the late Mr. Justice Dwarakanath Mitter says that "the Hindu law of inheritance in the widest acceptation of the term is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor is a proposition beyond all dispute" (true to a limited extent in the Bengal system of inheritance) one has to infer that the learned Judge was ignorant of the above citations. Their Lordships of the Privy Council, in the case of *Katama Nachiar* v. *Raja of Sivagunga* [1], say : "There are in the Hindu Law two leading rules of inheritance—that founded on the reli-

1. (1863) 9 M. I. A. 539 at 610.

gious duty and superior efficacy of oblations and sacrifice, and that of survivorship." The distinguished orientalist and scholar, Prof. Goldstucker also maintains that "there is only one principle, the principle of spiritual benefit and the second principle of survivorship does not exist at all." (Goldstucker's *Literary Remains,* Vol. II, 165-168). It is reassuring to find that the old and correct law of the Smritis is being gradually restored; the learned Judges of the Madras High Court say: "Though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognised that Vignaneswara and most of his followers put their system on a radically different basis" —*Balusami Pandither* v. *Narayana* [1]; see also *Subasing* v. *Sarfaraz Kunwar* [2]. Even the Calcutta High Court, that stronghold of the spiritual benefit theory which has been till recently supposed to underlie the Dayabhaga system of succession, seems disposed to think that affinity by blood was the main basis on which Jimutavahana reconstructed his tables of succession. (See the Judgment of *Mitter* J. in *Akshayachandra Bhattacherjee* v. *Doss Goswami* [3]).

A son, being thus a reduplication of father's self, was regarded as a necessary adjunct to maintain that continuity of life which ran through four generations. A text of Devala cited in Ratnakara says that "of the undivided as well as the divided members of the family living together, partition of the heritage extends to the fourth in descent: this is the law. *To that degree the members of the family are of the same body. After that there is difference of body* and the equal partition of pinda and heritage is desired." The discharge of the affairs of the household and the duty of presenting offerings to the departed which was cast on the head of the family need not suffer in the least by the break that occurred in the chain of life on the death of a Hindu. He committed these duties to the charge of his son. The Satapathabrahmanam says, "अथातः सम्प्रत्तिः । यदाप्रैष्यन् मन्यते अथपुत्रमाह." ("Now about the giving of charge; when he thinks he is dying, he says to the son." (Satapathabrahmanam 14, 4). An exact counter-part of the same ancient feeling appears in

1. (1896) I.L.R. 20 M. 342. 2. (1896) I.L.R. 19 A. 215.
3. (1908) I.L.R. 35, Cal. 721.

early Roman Law which regarded the devolution of inheritance as a form of universal succession by which the heir was *uno ictu* vested in the legal clothing of the departed ancestor. The fact that the sum total of a man's rights and duties should at his death vest in some individual who would represent him to the world here and above was realised with such distinctness as to create in him a craving for a natural born son. To this cause, more than any other, are to be attributed such effusions of the glories and virtues of a natural born son as are embodied in the following verses : " The hell called *put* where the childless go, he who delivers from that is called Putra" (Text of Harita cited in Kalpataru). The failure of a natural born son led to the practice of adoption but this was not reached all at once. The fiction of adoption, as remarked by the late Sir Henry S. Maine, is the most violent of all fictions; and the genius of the Roman lawyers as soon as it discovered its disadvantages hit on the conception of a will and the custom of adoption gradually receded to the background in the Roman system. Why did not the Hindu Jurists strike at the same line of thought ? is a question which one is naturally tempted to ask in this connection. It was not the want of practical insight into the nature of things but the limitations of the Hindu society in which they lived and for whom they laboured that furnish an answer. Legislative power was not one of the functions exercised by Hindu sovereigns, and though they were clothed with rights divine, they could not originate, alter or abrogate the laws which were supposed to emanate from the Deity itself and of which the King's advisers were the expounders. A king was considered bound to accept the advice given by his Judge. The kingly office is no doubt described in extravagant terms:—

" The ruler of the universe formed him of eternal particles, drawn from the substance of Indra, Pavana, Yama, Surya, of Agni and Varuna, of Chandra and Kubera. And since a king was composed of particles drawn from those guardian deities, he consequently surpasses all mortals in glory. He is fire and air. He, both Sun and Moon: he, the god of criminal justice: he the genius of wealth: he, the regent of waters: he, the lord of the firmament. A king, though even a child, must not be treated lightly from an idea that he is a mere mortal. He is a

powerful divinity who appears in a human shape." (*Manu*: Chap. VIII, v. 3, 4, 5, 7, 8).

But we see he is not endowed with any power of legislation, with any power of altering or abrogating laws which exist apart from him and has an origin superior to him. Under such conditions of society, it was not possible for the Hindu Smriti writers to introduce a new power of Testation that could regulate the course of devolution in the same way as the Roman lawyers did for those who left no issue behind them. The innovations of Roman jurists ostensibly proceeded from the Sovereign power that was regarded by the populace as the fountain of law and that had the strength to nerve the arm of law: but not so in India. Hence many temporary make-shifts in the way of hypothetical sons, had to be provided for before the sense of the community could fall in with the interpretation of the Smritis that on failure of a natural born son, the temporal and spiritual needs of a dying man could be amply, though not as effectually, met by an adopted son. The recognition of *Kshetraja* represents one phase of advance in legal theory of sonship. The Institution of Putrikaputra which still survives in the Sarvaswadhanam marriage of the West Coast represents another phase in the development of the legal theory by which a sonless father appointed his daughter to raise issue for him by her husband. The advancing ideas of later times rejected the practice of Niyoga and was dissatisfied with the Putrikaputra. The only alternative left was a resort to the practice of adoption which had not as yet gained universal acceptance. And the conditions which regulate its exercise are minutely laid down by Vasishta. (See his Texts, especially XVII, 26, 28, 30, 39; XV 1—10). We are here concerned with only one of his texts, *viz.*— "But let him not give or receive (in adoption) an only son; for he (must remain) to continue the line of his ancestors." It is not satisfactory to all that the Highest Court of Appeal for British India should, by a novel method of interpretation—a method which is not in agreement with the Mimamsic interpretation of the Hindu Texts—legalise the adoption of an only son. (*Balasu Gurulinga Sami* v. *B. Lakshmappa*; *Radha Mohun* v. *Hardhai Bibi*.[1] The historical review

1. (1899) 26 I. A. 113.

contained in the preceding pages would show that by the adoption of an only son the obsequies of his (natural) father would fail and the reason given by their Lordships of the Privy Council that the text appeals rather to the "moral sense of the hearers" is refuted by a reference to the chapter on 'gifts' in Viramitrodaya, Smriti Chandrika, Parasara Madhaviya and the Vivada Chintamani. Equally under the Roman law, at least under the early Roman Law, "no adoption could take place, until proper arrangements had been made for the celebration of the Sacra or the performance of the sacrifices and ceremonies in honor of the deceased ancestors of the natural father of the boy to be adopted." (GHOSE on *Hindu Law*, 1st Edn., p. 504). Although the Hindu legislators strained their resources to popularise the practice of adoption and succeeded in casting into disrepute the institution of other subsidiary sons, still they did not raise the adopted son altogether to the rank and dignity of an 'Aurasa'.

The following texts of Brihaspathi put the matter beyond the shadow of a doubt:—"As in default of ghee, oil is admitted by the virtuous as a substitute at sacrifices, so are the eleven sons (admitted as substitutes) in default of a legitimate son of the body and of an appointed daughter. No one but a legitimate son of the body is declared to be the heir of father's wealth. An appointed daughter is said to be equal to him. All the others are stated to have a claim to maintenance (only)." (Chap. XXIV, 12, 14).

Anglo-Indian judges, steeped indeed with western notions of equity, have no doubt held that an adopted son has all the rights of a natural born son in the paternal as well as the maternal line. (See *Sham Kumar* v. *Gaya*[1]; *Sankar* v. *Kulli Komal*[2]). The above decisions have received the stamp of approval of their Lordships of the Judicial Committee[3] but are they in accord with the genuine principles of Hindu Law? It remains only to point out how the two eastern and western branches of the Aryan race have developed the legal notion that presented itself to them at the threshold of their civilisation. Starting from an imperious necessity that a son was

1. (1876) I.L.R. 1 A. 256. 2. (1880) I.L.R. 6 C. 256.
3. (1883) 10 I. A. 138.

necessary to continue the line of his ancestors and to carry on the worship of the family gods, the Hindu struck on the practice of adoption which to this day figures as an important branch of Hindu Law and works momentous changes in the joint family system of the Hindus. Starting from the same notion, the Roman, with the practical eye of an accomplished jurist, saw the inconveniences and disadvantages of adoption, and originated the law of wills which has exerted a most powerful influence in transforming human society and in making its wheels move quicker. But the object that influenced the Hindu and the Roman Jurists was the same. It is certain that both in the early Roman Law of Inheritance and in the Hindu System of Succession the notion of a will and of adoption was the consequence of the theory of a man's posthumous existence in the person of his heir. The attributes of a modern will are apt to make us ignore the fact that the same conception underlay the two systems. A modern will may be described as an instrument in writing revocable at the pleasure of the testator, to take effect after his death. A peculiar feature of its character is its secrecy. But the researches of Sir Henry Mayne show that the ancient Roman Will—the "testament per aes et libram"—was a *proceeding* which conveyed out and out the testator's estate, and could not therefore be revoked, as "there could be no new exercise of a power which had been exhausted" (see Mayne's *Ancient Law*, p. 206) and that it was not secret. Saunaka tells us that a man eager to adopt has first to invite his kinsmen and in the presence of the "lord of the village" receive a son from his natural parents. It was thus a *proceeding* by which a sonless Hindu appointed an heir to him. It was attended with due publicity to avoid any future cavil or dispute. And when once a valid adoption had been made, it was not possible for the adopter to undo his act and the rights of the adopted son sprang into existence *eo instanti*.

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NOTES OF INDIAN CASES.

Chinnu Pillai *v.* Kalimuthu Chetty.—I L R. 35 M. 47.—The decision of the Full Bench in this case, it is hoped, will settle in this Presidency a vexed question of Hindu Law.

According to the decision of the Full Bench an alienee from a co-parcener would be entitled to what would be the share of the alienor at the date of the alienation and he would not be affected by events subsequent to the alienation. There is much force in the reasoning of Mr. Justice Sankaran Nair that, alienations not being recognised by Hindu Law, much assistance is not to be found in the Hindu Law itself in the solution of this question. As the alienee's rights are recognised more as a matter of equity, it would be inequitable, as pointed out by the learned Judge, to give the alienee the benefits of increased share, and it follows that it is more equitable to hold that the purchaser is not affected by subsequent births and that instead of taking a fluctuating share he takes the share which the vendor was entitled to at the time of alienation. That is more a matter of equitable principle and that can only be the legal basis for the decision. Of course one circumstance is not adverted to, viz., that a co-parcener cannot be entitled by his own unilateral will to declare himself divided, and he cannot, by transferring his rights, be entitled to do indirectly what he cannot do directly. The result, however, of upholding alienations is apparently to give the alienee a better right than his alienor. From the nature of a joint family, however, this result seems unavoidable.

SUMMARY OF ENGLISH CASES.

T. W. Thomas & Co. Ld. *v.* Port Sea Steamship Co., Ld. [1902] A. C. 1.

Bill of Lading—Construction—Incorporation of conditions as per charter party—Arbitration clause.

It would be a sound rule of construction to adopt that when it is sought to introduce into a document like a bill of lading a negotiable instrument, a clause such as this arbitration clause, not germane to the receipt, carriage or delivery of the cargo or the payment of freight—the proper subject matters with which the bill of lading is conversant—this should be done by distinct and specific words and not by such general words as those written in the margin or body of the bill of lading in this case. The words on the body of document were: "He or they paying freight for the said goods with other conditions as per charter

party" and the words in the margin were "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charter party; including negligence clause."

E. Clemens Horst Co. *v.* Biddel Brothers.

[1912] A. C. 18.

Sale of goods—Delivery on ship—Time for payment of price.

If there is no contract as to the time of payment of price in the case of a sale of goods under a c. i. f. contract, to be delivered on board a ship for being carried to the buyer's port, the seller is entitled to payment as soon as he ships the goods and tenders to the buyer the bill of lading and the policy of insurance. It is wrong to say that he must defer the tender of bill of lading until the ship has arrived and it is still more wrong to say that he must defer the tender of bill of lading until after the goods have been landed, inspected and accepted.

Delivery of the bill of lading when the goods are at sea can be treated as delivery of goods themselves, the law in this respect being established from ancient times.

Hanan *v.* Ehrlich. [1912] A. C. 39.

Contract of service—Construction—Whether not to be performed within a year.

A contract of service for a period of two years subject to determination at 6 months' notice on either side during that period is an agreement "not to be performed within a year" within the meaning of S. 4 of Statute of Frauds and therefore requires writing.

[Compare the decisions on S. 17, Cl. (*d*), of the Indian Registration Act.—Ed.]

Per *Lord Alverstone*.—If there is no mention of time and the time is uncertain, the agreement is not within the statute. If the time mentioned is more than one year but there is power to determine, the agreement is within the statute.

Per *Lord Atkinson*.—It is questionable whether the determination of a contract by merely giving notice within a year can be called a performance of contract within that year. If not, its

duration must be determined with regard not to this but to the other provisions it contains.

Per Cur.—Where the language of the statute is ambiguous and one finds that a particular construction has been put upon it by a number of authorities, extending over a great length of time it would be unwise and wrong on our part to adopt a different construction.

De Beers Consolidated Mines, Ld. *v.* British South Africa Co. [1912] A. C. 52.

Mortgage—Clog on equity of redemption—Debentures—Floating charge—Charter—Powers under.

In considering whether a contract is a clog upon the equity of redemption the test is whether the contracts of the parties in reference to these two matters (clog and mortgage) are different parts of one transaction in which case the contract as to clog would be unenforcible, or whether they are separate agreements, each independent of the other, the one forming no part of the consideration given for the other.

The well known doctrine of equity, that in equity everything should be taken to be done which ought to be done, cannot, in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do and nothing more and nothing less is to be taken, in equity, to be done.

A grant of a monopoly prohibited by the charter of a chartered company is *ultra vires* and void.

It is perfectly clear that the grant or license by a proprietor of land to some person to use and exercise exclusively over that land some of his own proprietary rights is not a monopoly of trade within the meaning of the clause prohibiting monopoly.

Obiter.—The House of Lords gave a unanimous *obiter dictum* to the effect that the rule as to clog upon the equity of redemption will not apply to debentures, for the following reasons:—

(1), that no specific charge is in the first instance created by these mortgage debentures; (2) that the mortgagor is free to deal, in the ordinary course of business, with the assets subject to the floating charge; (3) that the debenture-holder has no right similar to the right of foreclosure possessed by an ordinary mortgagee and can never recover more in money than the amount of his debenture.

A similar opinion of Lord *Macnaghten* in the *Jarrah case* (1904 A.C 323 at p. 327) was relied upon in support of the *obiter dictum.* The nature of floating securities such as mortgage debentures discussed.

Crawford & Law *v.* Allan Line Steamship Co., Ld.

[1912] A. C. 130.

Shipping—Through bill of lading—Carriage first by sea and then by land—Duty of shipowner to notify on land carrier of damage to goods.

In the case of a contract to carry goods partly by sea and partly by land under a through bill of lading it is the duty of the ship-owner, if the goods arrived in a damaged condition at their destination, especially if he had given a statement to the consignor of the goods that he had received them in proper condition, to notify to the carrier on land the state of the goods when he handed over to him if he wishes to exculpate himself from the liability to any further damage to the goods; for to hold otherwise, *i.e.*, to leave the consignees to discover for themselves on what part of the route the damage was caused, would be to place them absolutely at the mercy of the carriers. It suits the interests of these carriers to carry goods in this way for through freights; but if they adopt that method of doing business for their own gain, it is but reasonable that if they wish to escape liability themselves, they should be bound by noting the condition of the goods when received by them to protect the interest of their customers, the shippers.

Butter (or Black) *v.* Fire Coal Company, Ld.

[1912] A. C. 149.

Employer and workman—Injured workman—Negligence of another workman—Breach of statutory duty—Defence of common employment.

When there is a breach of statutory duties imposed upon the employers for the protection of workmen against injuries likely to be caused by the negligence of fellow workmen, the employers cannot avail themselves of the defence of common employment to protect themselves against consequences of injuries caused by negligence of a fellow workman.

Miza Mohamet Taekey. *v.* R. S. F. McBain.

[1912] A. C. 186.

Action of deceit—Untrue statement—What must a plaintiff prove?

In an action of deceit by untrue statement it is incumbent on the plaintiff to prove actual fraud, *i. e.*, a fraudulent intent on the part of the defendant.

Lady De Soysa *v.* Stanislaus De Pless Pol.

[1912] A. C. 194.

Contract—Penalty or liquidated damages—One sum stipulated for several matters—Assignment of contract after suit—Breach of contract—Damages pending suit.

In the case of a contract to build certain rooms in a building, to furnish them and to supply various articles of consumption to enable the plaintiff to carry on the business of a hotel in that building Rs. 150 was stipulated for each day of the breach of contract after the stipulated date: *Held* (1) that the breach was a continuing breach after the due date; (2) having regard to the number, dissimilar character and vague description of the several things contracted by the defendants to be done, the sum of Rs. 150 per day was liquidated damages and not a penalty; (3) The trial judge was entitled to give damages for breach of contract up to the date of judgment on a lower scale than Rs. 150 a day and to declare that the contract was to be at an end on that date; (4) unless there is a covenant prohibiting the assignment of the contract the promisee (lessee) was entitled to assign the contract—a right which would be consistent with a stipulation that the promissor (lessor) should not withhold his consent except for exceptionally good and strong reasons—and (5) that the assignee after the suit was entitled to be made a co-plaintiff along with the original promisee.

Corea v. Appehomy. [1912] A. C. 230.

Possession of one co-owner—Not adverse to other co-owners, if no ouster.

The possession of one co-owner is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. His possession cannot be adverse to others unless there is ouster or something equivalent to ouster. Though from continued, undisturbed and uninterrupted possession by one co-owner alone an original court may raise a presumption of ouster or something equivalent to ouster of other co-owners, yet if in a suit for partition between the co-owners who got the property by inheritance, the one co-owner who was in possession from the time the inheritance opened does not plead adverse possession as against others but pleads that he was the sole heir and was in possession as such, the orignal court would be right in not presuming an ouster and in decreeing the suit for partition.

Dyson v. Attorney-General. [1912] 1 Ch. 158. (C.A.)

Finance Act, S. 26, Cl. (1) & (3)—Notice, ultra vires—Part bad, whole bad—Taxing statute—Opinion as to value, not to be called for—Declaratory decree.

Section 26, Cl (2), of the Finance Act, 1910, is in these terms: "Any owner of land and any person receiving rent in respect of any land * * on being required by notice from the commissioners shall furnish to the commissioners, a return containing such particulars as the commissioners may require as to the rent received by him, and as to the ownership, tenure, area, character and use of the land * * and any other matters which may properly be required for the purpose of the valuation of the land and which is in his power to give, and if any owner of land * * fails to make such a return within the time, not being less than 30 days, specified in the notice requiring a return, he shall be liable to a penalty not exceeding £50."

Cl. (3) is in these terms: "Any owner of land may, if he thinks fit, furnish to the commissioners his estimate of the total value of site," &c.

A notice was issued under this section bearing date the 4th of August (but issued on the 9th) requiring the addressee (a house owner) to furnish within one month thereafter particulars as to the rent received in respect of certain holdings in the occupation of tenants and also as to the rental value of the house in occupation of the addressee himself, with a statement at the end that in default he would be liable to the penalty of £50 prescribed by the statute. The particulars were required to be furnished to a certain officer. In an action by the addressee against the Attorney-General as representing the Crown for a declaration that he was not bound to furnish particulars: *Held*: the notice was bad for various reasons:—

(i) Because the date specified did not comply with the requirements of the section, being less than 30 days from the date of receipt by the addressee.

(ii) Because the commissioners had no right to call upon the addressee to give his opinion as to the probable rental value of his house if rented out. They were entitled to call for information as to facts but not as to opinions which would be irrelevant in any enquiry not being of an expert.

Held also, that this latter objection vitiated the whole notice. As *Farwell* L. J. puts it "the duty and the penalty for disobedience are both one and indivisible and are co-extensive, and if the commissioners frame their requisition with so little care as to exceed their powers, the whole demand and not merely the *ultra vires* portion becomes unenforceable. * * * * This statute is not merely a taxing Act but a taxing Act coupled with duties to supply information of a most onerous character * * To such an Act of all others the statement of Lord *Cairns* in *Partington* v. *Attorney-General*[1] applies:—"If there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

It was argued that a declaration ought not to be made but the parties ought to be left to their defences when the penalty is sought to be recovered. The court overruled the plea, holding that a suit for declaration was the most convenient method

1. (1869) 4 H. L. C. 100. 122.

of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions.

A further point sought to be made by the appellant, viz., that the direction that the information was to be supplied to an officer other than the Commissioners was illegal was negatived as he was only an agent of the Commissioners.

Burgher *v.* **Attorney-General.** [1912] 1 Ch. 172 (C.A.)

Finance Act, S. 31—*Notice must specify land in respect of which information called for—Fixing of time, less than statutory, effect of.*

Like the last, this was also a case under the Finance Act. S. 31 of the Act provides :—" Every person who pays rent in respect of any land and every person who as agent for another receives rent in respect of any land shall, on being required by the commissioners, furnish to them within 30 days the name and address of the person to whom he pays or on whose behalf he receives rent, " while S. 31, Cl. (3) provides the penalty in case of default.

A notice was issued on the 25th of August, but actually served on the 26th. It called upon the addressee within 30 days of its issue to furnish particulars as to what holdings, what amounts and on whose behalf the addressee collected rents within a particular area, threatening the statutory penalty in default. The action, as in the previous case, was for a declaration that the addressee was not bound to supply the information. *Held* that such a general requisition was not contemplated by the Act. The notice ought to specify the holdings in respect of which the information is called for. *Farwell* L. J. thought, agreeing with *Warrington* J., that the notice was also bad in that it required the addressee to supply the information in less than the period prescribed by the Act, but the majority were not prepared to assent to this view, as the section did not, like S. 26, provide a date to be specified in the notice within which the act was to be done ; on the other hand it cast a duty on the addressee to supply the information within 30 days and the fact that the commissioners made a mistake in the notice did not alter his liability under the statute.

Sunderland Orphan Asylum *v.* River Wear Commissioners. [1912] 1 Ch. 191.

Private Act vesting reversion—Equivalent to grant.

A private Act of Parliament vesting the reversion in a company has the same operation as a grant and the grantee can take advantage of the covenants, &c., under the lease in the same manner as a private grantee.

In re **Beavan : Davies, Banks and Co. *v.* Beavan.** [1912] 1 Ch. 196.

Lunatic—Creditor of manager—Subrogation—Bank carrying on account with—Interest and commission, not chargeable—Acknowledgment by manager.

In this case, a customer of a bank became a lunatic. He had a son and 4 adult daughters who were living with him and being maintained by him. At the instance of the son, the bank continued to have account in the lunatic's name as previously. The rents and the other income of the lunatic continued to be paid into the account and moneys continued to be drawn and were expended for the maintenance of the lunatic and his family. The account was overdrawn and the estate of the lunatic became insolvent. *Neville* J. *held* that on the principle of subrogation, the bank was entitled to stand in the shoes of the creditors who supplied funds for the necessaries of the lunatic and directed an account as to how far the money provided by the bank was expended in payment of necessaries for the testator's (lunatic's) household and family having regard to his position in life and the protection of his estate.

The bank claimed the usual interest and commission but this His Lordship disallowed on the ground that it could be allowed only if the lunatic was liable on the account as such. The account was unauthorised and the bank's claim of right was only an equity.

It was also *held* in this case that an acknowledgment given by the son who was, as stated above, the *de facto* manager of the lunatic's estate, could not save limitation.

Mills *v.* United Counties Bank, Limited.

[1912] 1 Ch. 231 (C. A.)

Vendor and purchaser—Sale of equity of redemption—Implied obligation to indemnify—Purchase of a contingent reversion—Implication, excluded by circumstances.

While not assenting to the view of *Eve* J. in (1911) 1 Ch. 675 that the ordinary rule that the purchaser of the equity of redemption is bound to indemnify the vendor against the liability on the mortgage debt does not apply to the purchaser of a contingent reversion, the Court of Appeal upheld his decision on the other ground on which he put it, viz., that under the circumstances of the case the implication did not arise. The circumstances relied upon that excluded the implication were the fact that the purchaser was a first mortgagee, an express provision that the mortgage right would not be merged in the equity of redemption but on the other hand should be kept alive against the second mortgagee and an express indemnity in respect of certain other liabilities.

Farwell L. J. takes exception to the resting the obligation to indemnify the vendor, on contract; he regards it as an equity independent of contract and resting on the same basis as contribution, average, etc.

In re Poultney : Poultney *v.* Poultney.

[1912] 1 Ch. 245.

Will—Construction—Gift to children; any dying, shares to be divided among the rest—Events to happen before death.

A testator gave his estate to his widow for life, remainder to his children by name, and then added a clause that in case of the death of any one or more of the children, the share or shares should be divided between the survivors. *Held*, applying the well-known rule of construction according to which the courts do not look with favour on provisions divesting vested interests, that the death referred to was death during the lifetime of the testator.

Von Hatzfeldt Wildenbury *v.* Alexander.

[1912] 1 Ch. 284.

Sale—Acceptance subject to condition that solicitors approve title and contract, &c—Reference to formal contract to be executed, effect of.

It appears to be well settled by the authorities that if the documents relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction in each case whether the execution of a further contract is a condition or term of the bargain or it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which, according to their natural construction, import a condition, is generally, if not invariably, conclusive against the reference being treated as the expression of a mere desire.

In this case the offer of the defendant to sell to the plaintiff was accepted subject to the condition that the plaintiff's solicitors approve the title to and covenants contained in the lease, the title of the free-hold and the form of the contract. *Held*:—There is some authority for saying that where a purchaser stipulates that his solicitor shall approve the title of the property such stipulation may possiblybe construed as a recognition that the title will be examined in the usual way and need not be construed as a condition at all. But, in this case, having regard to the fact that the plaintiff's solicitors had to be satisfied of the freehold title as well, which could not be called for in an open contract for the sale of a lease, such a construction would be impossible. It would necessitate the reading a part as real condition, a part as mere expression of desire. Nor was the condition one which the purchaser could waive. Till a formal contract was drawn up, there was no contract at all and no suit for specific performance could be maintained upon it.

Griffith v. Richard Clay & Sons, Limited.

[1912] 1 Ch. 291.

Ancient lights—Depreciation in value by obstruction—Sale value of entire premises, not only of house, to be considered.

In estimating damages for obstruction to ancient lights, it is permissible to look not only to the depreciation in the value of the house as such but also to the diminution in value of the whole of the premises considered as a building site. In this case, the house as such had little attraction, the quarters having ceased to be residential, but, along with the vacant site behind, had great facilities for the erection of a factory. *Neville* J. *held* that it was open to the court to take into account the diminution in value of the site as a factory site in assessing damages and that the court was not bound to allow as damages only the difference between the value of the house before the obstruction and its value after the obstruction.

Webb v. Crosse. [1912] 1 Ch. 323.

Mortgage—Tender conditional on execution of conveyance, good—Reasonable time to be given—Costs of conveyance, or vesting order—Absconding trustee.

Though it is not necessary to stop the running of interest in the case of mortgage that there should be such a tender as would afford a defence to an action at law, still when a tender is made conditional on the execution of a conveyance, a reasonable time should be allowed to obtain the execution of the conveyance, especially when the conveying parties are not the parties to whom the tender is made. When such a time is not given the tender is bad.

The costs of the reconveyance fall on the mortgagor even where the title has got complicated by the acts or omissions of the mortgagee. The mortgagor has to pay the extra costs occasioned by the legal estate having descended to an infant or lunatic heir or been devised to a trustee who cannot be found or by reason of the mortgagee having settled the mortgage security. One exception is made; that is when the mortgagee himself becomes a lunatic. No explanation can be suggested for the exception. The exception cannot therefore be extended. The mortgagor is to pay the costs of the vesting order in a foreclosure action,

Equally he is bound to pay the costs of the vesting order necessitated by the trustee of the mortgagee going away without leaving his address. Such an act cannot be said to amount to misconduct which would disentitle the mortgagee from claiming the costs.

In re Savin: Worseley v. Marshall.

[1912] 1 Ch. 332.

Interest—Annuity—Judgment—Difference between action on mortgage and action for arrears against general estate.

As between incumbrancers and as against the property charged, no interest will, as a general rule, be allowed on arrears of annuity. This rule has no application to the working out of a judgment in an action for the administration of the estate of the grantor of the annuity. The basis of the rule is supposed to be that allowing interest on annuity would be allowing interest twice over as in fixing the annuity the capital as well as interest is taken into account. The rule cannot be extended to cases not covered by authority as on principle there is not much reason to distinguish an ordinary debt from a debt payable periodically like an annuity.

In re DaCosta: Clarke *v.* Church of England. Collegiate School of St. Peter. [1912] 1 Ch. 337.

Gift to charity liable to be defeated in certain event—Gifts over to objects, not charity—Gift over and condition bad—Gift to charity good.

A gift to *A* for life, remainder to a particular charity subject to being defeated on the trustees failing to do particular acts and gift over to such person or persons as the Governor-in-Chief o South Australia shall direct or for such public purposes as he shall name. *Held*: the gift over being not for charity was bad as offending the rule as to perpetuities; so also the condition on the happening of which the estate in favour of the charity should cease. *Held*, accordingly, that the charity took the estate absolutely and without any condition.

JOTTINGS AND CUTTINGS.

THE LONDON "TIMES" ON THE ADMINISTRATION OF JUSTICE IN BRITISH INDIA.

The *London Time*, referring to the length of the Dacca trial, has apparently some scathing criticisms to offer against the Judges of the Indian courts and against counsel generally, and recommends a close and systematic inquiry into the administration of justice throughout India. From the meagre summary given by Reuter it would appear that the *Times* complains of the tendency of Indian courts to permit a waste of time, of the scandalous latitudes enjoyed by counsel and of the singular discrepancy between the views of the Sessions Judge and of the High Court. While we heartily wish that a commission should be appointed to inquire into the administration of justice we must protest against the remarks of the *Times* that any, much less scandalous, latitude is enjoyed by counsel or pleaders in this country. The complaint, on the other hand, is that Judges in this country pay very scant courtesy to pleaders employed, and evince impatience in listening to arguments, so that far from enjoying any latitude in arguments pleaders feel the greatest restraint in making themselves heard before judges. Owing to the way in which Judges are manned in this country, we do not find the same quality of work turned out by our District Judges as by Judges in England and other countries. Here in India we have a system which might have worked well in days long gone by but which has now become extremely antiquated. District and Sessions Judgeships in this country are, with very few exceptions, filled by civilians who have no legal training and who, in the great majority of instances, have shewn no inclination to master the growing technicality of the law. Unless Judgeships are filled by men from the Bar, as County Court Judges are in England, it is impossible for the administration of justice to be in the same efficient state as it is in England, America and other countries. There is also a complaint that the civilian coming out from England is of an inferior type to those who came out to this country more than twenty or twenty-five years ago. Not being a trained lawyer and not having a judicial training, the civilian Judge finds difficulty in mastering

the principles of law without an adequate knowledge of which he can scarcely hope for any success in his work, and with the growth of reports he hardly finds time to acquaint himself with a sufficient knowledge of case-law. Work in these days is exacting and what with an enervating climate the civilian feels himself utterly helpless without any fault of his own. That may apparently account for the singular discrepancy, if any, between the views of the Sessions Judge and those of the High Court noticed by the *Times*.

We heartily wish with the *Times* for the appointment of a commission as we have no doubt that the commission will point out the above defects in the present system of manning Judges in this country.

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The Duty of the Lawyer as an Officer of the Court.—We take the liberty of extracting the following from the *Green Bag*, from an address by CHRISTIAN DOERFLER as President of the Milwaukee Country Bar Association.—ED.

When I assumed this office I made the statement that my primary object would be to bring about, if possible, a higher standard of the profession as far as the public is concerned. The profession of law is one of the most highly respected of all the learned professions. To successfully practise that profession requires not only the highest of intellectual accomplishments, but the highest standard of morality and fair dealing. The profession does not, *in the eyes of the public*, occupy that high and dignified stand that it is entitled to, and I believe that this is due, not solely to a prejudice on the part of the public entertained towards the profession, but also to the law itself and to the members of the profession. While I have constantly had in mind the ideal which I set before me at the beginning of my administration, I am constrained to plead that I have done comparatively little to advance this high standard. Let us for a moment consider the cause or the reasons why the profession does not occupy morally in the eyes of the public the stand which it ought to. In the first place, attorneys generally are too closely indentified with the success and failure of litigation. It has been my observation, and also that of a great many members of the profession, that an attorney in a case is more interested in the outcome or results of litigation than is the client. *He has not only at stake to a great extent his fee involved, but his reputation as an attorney.* The result of this is that every possible

point is strained by counsel to the utmost limit for the purpose of securing and acquiring the desired end. *The object of the attorney is to attain success.* While attending a lecture at the law school at the University while I was a student there, one of the most noted lecturers of that institution made the statement that "*A good lawyer wins law-suits.*" Now, while that is, of course, a very desirable object to attain, it is often-times accomplished at the sacrifice of the highest purpose for which the profession exists. It must always be remembered that the profession of law is instituted among men for the purpose of *aiding the administration of justice.* A proper administration of justice does not mean that a lawyer should succeed in winning a law-suit. *It means that he should properly bring to the attention of the court everything by way of fact and law that is available and legitimate for the purpose of properly presenting his client's case.* I have oftentimes thought, and I still believe, that the profession of law as it is now practised, and has been practised from time immemorial, is to a great extent at fault for the failure in securing justice. *As long as private individuals are at liberty to use an officer who is a quasi-public officer as a representative, and pay him out of their private means, so long will the ends of justice to a great extent be diverted from that source.* As stated before, an attorney at law is a *quasi*-public officer. His duty as far as his client is concerned is simply to legitimately present his side of the case. His duty as far as the public is concerned, and as far as he is an officer of the court, is to aid and assist *in the administration of justice.* How to obviate this difficulty is one to which I have given a great deal of thought and attention. I will simply make a suggestion and that is this: *That the duty that counsel owes to the court and to the public be increased and that the duty which he owes to his client be decreased proportionately, so that private interests shall not have the power to induce an officer of the court to trespass upon the rights of the public.* In that respect I make this suggestion that it might be worthy of this Association and of the profession in general to consider the proposition to make the members of the profession officers of the public almost exclusively, and that remuneration be derived from the public in the same manner as judges are now paid. Then again, as part of the expenses of the litigation, the client engaging the services of an attorney could then be required to pay into the public treasury a certain sum of money for the services of counsel. Counsel would then be directly responsible to the public, and his only object in the practice of his profession would then be to aid in the proper administration of justice. I do not know

whether this system has ever been suggested to the profession, or whether it is in practice in any community, but I am convinced that it is one which deserves careful attention, and one in relation to which the profession generally ought to take some action.

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On the other hand, our courts and our judges have always occupied the highest moral standard in the eyes of the public. Seldom, if ever, do we hear of any charges against a judge for either partiality or abuse of office. There is a reason for this, and the primary one, in my opinion, is the fact that the judge exists solely to promote the administration of justice. *He is a purely public official and owes an obligation to no one outside of the public.* He draws his compensation from the public treasury; *he is no client's tool, nor is he subservient to the dictates of counsel.* Like the goddess of justice, he holds the scales blindfolded and administers the law according to the dictates of his conscience. Therefore, if the lawyer could be more of a public official, so that his obligation would rest more towards the public than towards private individuals and private interests he would not only be a greater factor, promotive of the highest aims of the profession, but would, like the judges, occupy the highest position for morality in the eyes of the public.—*The Green Bag.*

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The Devil and the Lawyers.

THE devil came to the earth one day,
And into a courtroom took his way,
Just as a lawyer, with very grave face,
Was proceeding to argue the points in a case.

Now a lawyer his Majesty never had seen,
For to his dominion none ever had been;
"Tis the fault of my agents," his Majesty thought,
"That none of these lawyers have ever been caught."
And for his own pleasure he had felt a desire
To come to the earth and the reason inquire.

Now, when the first lawyer had come to a close,
The counsel opposing him fearlessly rose,
And heaped such abuse on the head of the first,
That he made him a villain, of all men the worst.

Each claimed he was right and the other was wrong
They sparred and contended and argued so long,
That, concluding he'd heard enough of the fuss,

"Old Nick" turned away, and soliloquized thus:—
"They have puzzled the court with their villainous cavil,
And I am free to confess they have puzzled the devil.
My agents were right; let lawyers alone.
If I had them, they'd euchre me out of my throne."

The Green Bag.—Docket.

Literature and the Bench.—"Literature and the Bench" was the subject of some witty discussion at one of the delightful dinners of the Authors' Club in London, Dec. 4, and Sir FREDERICK POLLOCK was the guest of honor. For the following report the *Green Bag* is indebted to a correspondent who very kindly sent it a clipping from the London *Daily Telegraph.*

His Honor Judge Parry, himself an author and dramatist of no mean repute, occupied the chair. Proposing the health of the guest he said the Authors' Club has two interests in Sir FERREDICK POLLOCK. They could divide him scientifically into two parts. In the first place he was a fellow-author—(cheers)—and he had written books some of which it had been his Honor's duty to read—(laughter)—his pleasure to read. (Hear, hear.) He would say this about Sir Frederick's law books—and nobody had a greater detestation of law books than he—(laughter)—that there was a style and distinction about them which made them almost pleasurable to a humble layman like himself.

But there was a mountaineering book which must have appealed to some, a little, slim volume which though his Honor had just moved into a new house, he was able to find (laughter)—"Leading Cases done into English." That little book of poetry—it was poetry—contained a great deal of humanity, and it had often been a marvel to his Honor why a man who could write such charming occasional verse should have wasted the dreary years of his life on law books. (Laughter and "Hear, hear.") Did they know the story of Dixon and the Great Northern Railway? This was in the great work now edited by Sir Frederick Pollock, the Law Reports, a dreary work, but, done into verse as he had done it in "Leading Cases done into English," it was one of the most delightful ballads—a ballad of which Ingoldsby himself might have been proud. (Hear, hear.)

Judge Parry knew only one subject more painful than an editor, and that was a publisher. Sir Frederick Pollock, however, was not likely to be called upon to edit anything that they might write. His waste-paper basket was occupied by the judgments of the Court

of Appeal, and his blue pencil with the irrelevant remarks of the Master of the Rolls. (Laughter.) It seemed to him to be a fine thing—he spoke as a county-court judge who suffered much from the court above—(laughter)—to be able to edit the Court of Appeal, and he said without hesitation that it was a great thing for the reputation of the Court of Appeal that they had Sir Frederick Pollock to edit them. (Hear, hear.) Sir Frederick was always very kind to the county-court judges. In the great work which he edited, when a county-court judge was overruled he was always referred to in the Biblical phrase of "a certain judge." (Laughter.) He should like to take that public opportunity of thanking Sir Frederick for his editorial kindness. The only suggestion he would make was that when the House of Lords overruled in some workmen's compensation case the Court of Appeal, and set back the judgment of the learned county-court judge, he then might mention one's name.

It entirely rested with Sir Frederick, said Judge Parry, what the judges were allowed to do and what they were allowed to say, because he edited the Law Reports, and if he chose to "basket" the whole lot of them their judge-made law would never reach the county court in which he (the speaker) sat, and he should not be at all sorry. If he liked, Sir Frederick could return the Lord Chief Justice's judgment "with the editor's compliments"—(laughter)—and not only were he (the speaker) and his colleagues satisfied with Sir Frederick, but he believed that even the judges whom he edited were equally satisfied. He believed the Law Reports made money. He did not say they deserved it—(laughter)—but he believed they did, and he thought that why they were recognized throughout the English-speaking world as being a great, a true, and a good record of the sayings of English judges and the judge—made law of his country was because they were splendidly staffed and magnificently edited. As author and as editor they in that club were proud to welcome their guest. (Cheers.)

Sir Frederick Pollock in reply declared that the chairman's remarks had been made with the intention of drawing him out about the Law Reports. It was true he had a blue pencil, but what he did with his blue pencil in the way of correcting the grammar of My Lords the King's Justices, not to mention that of the Lords of Appeal, which he might say, in confidence, was much worse, was a matter between his blue pencil and himself. (Laughter.) The

chairman forgot that he (Sir Frederick) was only the servant of the Council of Law Reporting, and if he suppressed whole judgments the council would have something to say. Still, they did get the judgments edited, and he hoped that on the whole they were grammatical. But his was not such a monstrous claim as that any editor of them could turn them, taken with the lump, into literature. He was, however, asked to talk about law and literature. The obvious way of treatment would be to speak of the contributions made by Judges and eminent lawyers of unprofessional literature. But this would be too extensive and miscellaneous, though it would be tempting to compare the performances of the different learned Faculties in this respect. One might set off Sir John Davies on the Immortality of the Soul against Sir Thomas Browne's Religio Medici, but later, if the Rev. Laurence Sterne might be taken seriously as a divine both law and medicine would have to give place to the author of Tristram Shandy. Besides, there is a grave initial difficulty.

What about Bacon? He meant to prove some day that, so far from Bacon having written Shakspeare, it was Shakspeare who wrote Bacon's literary works. Bacon, being the wisest and also the meanest of mankind, paid Shakspeare to write those works. It was of a piece with his meanness to make Shakspeare take legal tips for the plays in part payment. Still, Bacon incurred heavy debts to Shakspeare, and thus was driven to take bribes. The detailed proof not being yet fit for the public eye, they must avoid the whole topic. Moreover, he should be trespassing on a field in which their chairman, Judge Parry, was far more competent than himself. (Cheers.) Therefore, let them approach the relations of law and literature on a less familar side, and see how much literature lay hid in law books whose very existence was hardly known to the general public.

In the legal works written in England in the Middle Ages (though not in the English language) there was much material for the social historian and the novelist (but Mr. Maurice Hewlett was probably the only novelist qualified to use it). A few of these nameless compilers, such as the collector of precedents for the Court Baron in the fourteenth century (published twenty years ago by the Selden Society) seemed to have had some literary faculty and sense of humor. But none of these books, on the whole, could be called literature. In the Elizabethan period they had several classics of the common law, but there were no classics of English letters. Coke was a pedantic, old-fashioned scholar (not illiterate,

as one or two recent writers had unjustly said). Bacon's professional writings had no marked literary distinction. Sir Thomas Smith's "Commonwealth of England" was a political classic, but he was, properly speaking, not an English lawyer at all; his learning was civilian.

The handling of law in a scholarly and literary fashion by English lawyers began in the eighteenth century. A case might be made out for Lord Mansfield as a pioneer, which still had a European reputation. It was Blackstone, however, in 1765, who produced a doubly classical work. His Commentaries were a great literary performance. As his great adversary, Bentham, handsomely allowed, he taught jurisprudence to speak the language of the scholar and the gentleman.

From the latter part of the eighteenth century onwards they had reports of carefully written judgments in the superior courts (in books that only lawyers knew how to consult), many of them by good scholars, not a few of them serious contributions to political and historical science beyond legal technicality. Lord Stowell's judgments in the Admiralty, which made our modern law of nations in time of war, were models of English exposition. How many of our publicists who talk glibly of contraband and the Declaration of London had read them at first hand? (Laughter.)

Then, in the second and third quarters of the nineteenth century, we had a golden age of great English judges, handling the language partly with finished scholarship and partly with mother wit sharpened by long experience of affairs and advocacy. Not striving to adorn their plain business, they could rise to the height of great occasions. There had been infinite talk among authors about the principles of copyright. How many authors knew that the fundamental question of natural right was elaborately discussed (though not strictly decided) in a case before the House of Lords in 1854, and the arguments on both sides set forth in the opinions of the Lords and the judges, not only with learned reasoning, but with judicial eloquence?

Again, there was much talk just now of marriage and divorce. Half a century ago the marriage law of England before the Reformation was explained in an opinion given to the House of Lords, which was really a masterly chapter of historical research, expressed with great literary skill. The author of that opinion was the late Mr. Justice Willes. Another time a Judge of Assize committed a wit-

ness for contempt in refusing to answer, and the question was raised whether he had the powers of a superior court. Sir James Shaw Willes (who was not only a very learned lawyer, but an accomplished scholar in several tongues), wrote a judgment which, after fully fifty years, was a classical and, he believed, a faultless) authority on the whole subject of Justices of Assize and their jurisdiction—surely a matter for students of English history as well as lawyers—and excellent English, too. He suspected very few historical students knew either of these great expositions.

It was certain that the great mass of law-books made no pretence to style, sometimes very little even to tolerable arrangement. It was also certain that the increasing press of modern business did not favour the writing of carefully finished judgments. But the proportion of legal writers who tried to write good English was increasing both here and in America. He could remember when it was very small. His lamented friend, F. W. Maitland, produced not only historical but strictly professional work of high literary merit, as all his readers acknowledged; and he ventured to say the same of two living learned friends, one on each side of the Atlantic, Justice Holmes, of the Supreme Court at Washington, and Professor Dicey of Oxford.—*The Green Bag.*

A Judge in Arms.—That great jurist, parliamentarian and man of affairs, Lord Coke, has claims to consideration as a man of action in the field of arms as well as in the halls of Westminster and Parliament.

For a second wife he married the widow Lady Hatton, a woman much younger than himself; and the marital differences of the ill-assorted couple furnished the courts of Elizabeth and James I with piquant material for gossip. The lady never overcame the aversion with which, it is said, the first meeting with Sir Edward inspired her. She persisted always in spelling his name "Cook" as a reminder of his humble orgin, and made use of the name and title of her former husband in all social relations. Matters between them came to a crisis when Coke contracted a marriage for their daughter, the Lady Frances, with Sir John Villiers, brother of the great Duke of Buckingham. The mother was not unnaturally incensed at being ignored in a transaction of this nature. Finding ordinary opposition to the match of no avail, she adopted the bold course of seizing the young lady and carrying her away under cover of night to Oatlands, a country place occupied by a relative.

It was when Coke learned of this *tour de force* that he forgot the peaceful procedure of law, if law there was for the emergency, and his dignity as Chief Justice of all England; and at the age of sixty-nine, donning armor and providing himself with a sword, he marched into the country at the head of his sons and a numerous body of servants and retainers. Coming to Oatlands, he called upon the keepers to surrender his daughter. Receiving no satisfaction he first delivered in a high voice an exposition of law for the enemy's benefit. If, said he, any were slain by him in the enterprise, that would be justifiable homicide; but if the defenders took life it would constitute murder, for their resistance was illegal. He then led an assault in force and form, broke down doors and forced windows, and after meeting less opposition than might have been expected, recovered his child and bore her away to his own place at Stoke Pogis.

Lady Hatton, while in possession of her daughter, had been active in negotiating a marriage with the Earl of Essex, for no other purpose it would seem than that of checkmating her husband. She found a powerful ally in Lord Chancellor Bacon, who with reason feared the ascendancy which his rival, Coke, would acquire by an alliance with the family of the favorite duke. But Buckingham and King James espoused the father's side of the quarrel, and Bacon for very self-preservation was forced to abandon his policy, and to urge forward the nuptials of Villiers. Lady Hatton at this time making a more ill-advised attempt again to secure possession of her daughter at Stoke Pogis, Coke brought the matter before the Privy Council as a breach of the King's peace, and had the satisfaction of confining his wife in the Tower while the marriage of his choice was taking place. No further action was taken against the lady. Shortly after she was released, and the King himself induced her to join in making a marriage settlement on her son-in-law.—*The Green Bag.*

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Not Prejudiced:—The story of the honest Swiss who was too busy to leave his farm, and begged the neighbour who was bringing suit against him kindly to plead for both parties, has an amusing parallel in the judicial history of Connecticut.

A certain justice of the peace, wishing to bring a suit against a citizen, consulted the statutes and found that suits of such a character might be brought before any justice of the peace. Accordingly, he concluded to try the case himself. Straightway he made out a writ against his adversary and signed it.

On the day set for the trial, the defendant appeared with counsel. Both gentlemen, not unnaturally, objected to the constitution of the court.

"Why," demanded the justice, "do you deny that I am a justice of the peace?"

The lawyer would not contest this point, but argued that such a construction of the law was against all sense and reason.

A vigorous altercation ensued, and then the judge remarked that not for the world would he have two gentlemen suppose him governed by any personal considerations. "I will therefore," he added gracefully, "render judgment against myself, and then appeal to the supreme court."

"But the curious part of it all was," said the justice, in relating the story afterward, "that when my judgment got to the Supreme court it was unanimously re-affirmed."—*The Green Bag.*

* * *

A Prince In Contempt of Court:—Since earliest times the judiciary of England has maintained its prestige to a degree unequalled in any other land, stoutly resisting encroachments by both the Crown and the people, as represented in the House of Commons. Perhaps one of the most significant incidents on record is that of Henry V, when Prince of Wales, and Chief Justice Gascoigne.

A favorite servant of the Prince was indicted for a misdemeanor, and despite the promptly exerted influence of his royal master, was convicted and condemned. Enraged at the outcome of the trial, the Prince rushed into the chamber and demanded that the prisoner be instantly set at liberty. The Chief Justice mildly reminded the Prince of the reverence due to the laws of the realm, and advised him, if he wished to be of assistance to the condemned man, to apply to the King, his father, for a pardon. In a still greater fury, Henry endeavored to take the prisoner from the hands of the court officers by force, but stopped short at sight of the stern face of the Chief Justice, who, rising, addressed him coldly :

"Sir," he said, "remember yourself! I keep here the peace of the King, your sovereign lord and father, to whom you owe double allegiance. In his name, therefore, I charge you to desist from your disobedience and unlawful enterprize and henceforth give a better example to those who shall hereafter be your subjects. And now, for the contempt and disobedience you have shown, I commit you to the prison of the King's Bench, there to remain until the pleasure of the King, your father, be known."

Henry, by this time sensible of the insult he had offered the laws of his country, suffered himself to be conducted to gaol by the officers. His father, Henry IV, upon hearing of the incident, exclaimed joyously: "Happy is the King who has a magistrate possessed of courage to execute the laws; and still more happy in having a son who will submit to the punishment inflicted for offending them."

The Prince himself, when he became King, in speaking of Sir William Gascoigne, said:—

"I shall ever hold him worthy of his place, and of my favour; and I wish that all my judges may possess the like undaunted courage to punish offenders, of what rank soever."

This is the only incident in history where a Crown Prince was committed to prison for contempt of court.

Lord Chief Justice Holt was particularly watchful that the courts should not be intimidated by Parliament. In 1704, several persons who claimed to be freemen of the Borough of Aylesbury were refused the privilege of voting at an election for Member of Parliament, and brought an action against the returning officer for the penalties which the law imposed in such cases. The House of Commons, conceiving this appeal to the courts to be an evasion of their privileges, passed an order declaring it to be penal in either judge, counsel, or attorney to assist at the trial. The Lord Chief Justice and several lawyers, however, proceeded with the case in regular course. The House, highly indignant, sent their sergeant-at-arms to command the judge to appear before them, but the command was ignored. A second order was sent by the Speaker, attended by a number of members. The Speaker's summons was retorted to as follows:—

"Go back to your chair, Mr. Speaker, within these five minutes, or you may depend on it I'll send you to Newgate. You speak of your authority! But I tell you I sit here as an interpretor of the laws, and as a distributor of justice; and were the whole House of Commons in your belly, I would not stir one foot!"

The Speaker was prudent to withdraw, and the House, with equal prudence, let the matter drop.—*The Green Bag.*

The Wisdom of Lawyers.—It appears that judges and lawyers have contributed a liberal share to the stock of popular sayings.

It is Francis Bacon who speaks of matters that "come home to men's business and bosom," who lays down the axiom that "Knowledge is power," and who utters that solemn warning to enamored Benedicts, "He that hath a wife and children hath given hostages to fortune."

We have the high authority of Sir Edward Coke for declaring that "Corporations have no souls," and that "A man's house is his castle."

The expression "An accident of an accident" is borrowed from Lord Thurlow. "The greatest happiness of the greatest number" occurs in Bentham, but as an acknowledged translation from the jurist Beccaria.

To Leviathan Hobbes we owe this maxim, "Words are wise men's counters, but the money of fools." It is John Seldon who suggested that by throwing a straw into the air, one may see the way of the wind; and to his contemporary, Oxenstiern, is due the discovery "With how little wisdom is the world governed."

Mackintosh first used the phrase "A wise and masterly inactivity." "The schoolmaster is abroad" is from a speech by Lord Brougham.

In the familiar phrase "A delusion, a mockery, and a snare," there is a certain Biblical ring, which has sometimes led to its being quoted as from one or other of the Hebrew prophets; the words are, in fact, an extract from the judgment of Lord Denman at the trial of O'Connell—*The Green Bag.*

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Ellenborough's Sarcasms.—It is said that Lord Ellenborough, as Chief Justice of England, was pitiless in his severity to lawyers who attempted to display eloquence while they lacked wit or brains. His sarcasms were as frequent as they were terrible. He interrupted one barrister, who, soaring to a poetical flight, exclaimed, "This may be found in the large volume of Nature," by saying, "Pray, at what page, sir?"

An Irish barrister, beginning a fine figure about an eagle, was confused by his lordship's contemptuous look and lost his way, when the judge commented, "I would advise you, sir, to clip your eagle's wings the next time you bring him into court."

An ambitious young lawyer, striking a pathetic vein, and repeating the phrase, "My unfortunate client, sir," was silenced by the remark, "Go on, sir; the Court is with you so far."

A barrister, having wearied the court by a tedious plea, was interrupted by adjournment, and said, "I shall have the pleasure of addressing the court, then, on Friday." Very quickly came this response from the Chief Justice :—

"The Court will hear you on Friday, but pleasure was out of the question long ago"—*The Green Bag.*

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Proof of a Lost Will.—In the famous case of *Sugden* v. *Lord St. Leonards* (1876). which arose out of the loss of the will of the great Victorian Lord Chancellor, it was laid down by the Probate Court, and affirmed by the full Court of Appeal, that the contents of a lost will, like those of any other lost instrument, might be proved by secondary evidence. Declarations, written or oral, made by the testator both before, and, according to the better opinion, after the execution of the will have been held admissible as evidence of its contents, but not as evidence of the execution *Atkinson* v. *Morris,* (1897). Nevertheless, the Courts have been loth to extend the doctrine established by the leading case; and, as was said by Lord Fitzgerald in *Woodward* v. *Goulstone* (1886), the Sugden decision 'reached the very verge of the law.' It requires very strong circumstances and unimpeachable evidence to allow proof of a will upon oral evidence alone, and were it not so the court would be the happy hunting-ground of all manner of unscrupulous claimants to the property of deceased persons. It is not surprising, therefore, that the jury last week in the case of *In re Holden Turner (deceased)* refused, under the direction of Sir Samuel Evans, to accept the evidence as to the contents of a will of five pages which had disappeared, and of which the only written evidence was an entry in the testator's diary to the effect that he had made his will on a certain day. The evidence in favour of the will having been made, and not having been destroyed by the testator, was certainly considerable; the claim to probate was set up jointly by several near relatives of the deceased; and the will which they desired to propound was reasonable enough; but the President pointed out that it was a strong thing for the court to find, on such oral testimony as it had before it, substantially the testamentary intentions of the testator, and the jury reasonably came to the conclusion that the evidence was insufficient. In the *Sugden Case,* it is pertinent to remember, a number of codicils of the testator were found, although the will itself had disappeared, and they threw light on the terms of the will. But here there was nothing to check the assertions of the

claimants. Not a few distinguished judges have been inclined to question the decision in *Sugden's Case*. Almost all of those who have had to adjudicate on similar claims have expressed their unwillingness to carry the principle further; and, in the interest of certain justice, it is desirable that only in very exceptional circumstances should oral evidence of contents be admitted in testamentary cases—*The Law Journal.*

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The Custody of Wills.—SIR JAMES HANNEN in his judgment in the celebrated case relating to Lord St. Leonards' missing will, drew pointed attention to the existence of the Depository at Somerset House for the safe custody of the wills of living persons. Sir Samuel Evans might well have taken advantage of the opportunity afforded by the *Turner Case* to render a similar service. It is difficult to understand the little use made of the Depository, except on the assumption that its existence is among the things not generally known. Sir James Hannen referred regretfully to the fact that in 1873 only seven testators placed their wills in the Depository. Now-a-days, taking the average of the past three years, the number is not more than twice as large. And yet it is pretty safe to say that every year more than fourteen wills are mysteriously missing. The fees charged on the depositing of a will are as moderate as the procedure is simple. A testator who deposits his will in person is required to pay only 12*s*. 6*d*. In the presence of the Registrar, he places his will in an official envelope, on which he signs an indorsement, giving the date of the will and the name and residences of the executors. If the deposit is made by an agent, a few extra shillings are payable for the necessary affidavits, but the procedure is as simple as before. No one lives too far from the Depository to be excluded from its advantages. A testator is at liberty to transmit his will to the Principal Probate Registry, through the Registrar of a District Probate Registry, by whom it is forwarded in a registered letter. A will once deposited is not delivered up, but the testator is free either to have it destroyed in the presence of an official or to alter it by codicil. He may even revoke it by another will which is not deposit ed. The freedom of the testator to change his mind is, indeed, absolutely untouched. There are, of course, many persons who find it convenient to leave their wills in the custody of the solicitors who have drawn them, or to place them with other documents at their bankers'; but there are others to whom these advantages are less

available. For their benefit, at least, it would certainly be well if the existence of the Depository were made more widely known—*The Law Journal.*

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Tramway Authorities and the Public.—Several interesting points of law arise out of an action, to which the Birmingham Corporation were defendants, in the Birmingham County Court on January 26. The plaintiff hailed a tram at one of its 'optional' stopping places—*i. e.*, one of those points at which it is advertised to stop 'if required.' There was room for the plaintiff and his party on the car; but an inspector on board directed the conductor to go on to the next 'compulsory' stopping place, because the road was in a state of repair, and too frequent stopping would congest the traffic. The plaintiff with his friend then took a waggonette to their destination, at a much enhanced cost; he sued the Corporation for the difference, some eighteen shillings. The Registrar of the Court tried the action and dismissed it. There were, in fact, several answers to the plaintiff's claim. A statutory undertaking, such as a tramway company or corporation having tramway powers in force, owes its statutory duty not to individual members of the public but to the public at large. The proper, and only, representative of the public at large is the Attorney-General; he alone can enforce the public statutory duty of the undertaking to provide a reasonable service of trams. This he can do either by an *information* for penalties (see Crown Office Practice, title Information), or by a *mandamus* to compel the company to perform its duty, or—in an extreme case of default—by a writ of *scire facias* for the forfeiture of its statutory rights. No private person could recover damages for breach of this statutory duty, unless he could show special damage suffered by him which would not have been suffered by other members of the public in the same circumstances [*Rose* v. *Miles* (1815) 16 R. R. 405]. And, of course, the company, or authority, can hardly be said to act unreasonably merely because one of its officers, in the exercise of his discretion, prefers not to risk an obstruction of the highway by too frequent stoppages. The same considerations would apply, in our opinion, had the scene of the alleged delict been a compulsory and not merely an occasional stopping-place. The distinction between these two classes of stopping-place is merely one of convenience and discipline as between the undertaker and his servants, the conductors; it does not impose on the latter any duty towards the public to stop at the indicated stages. Of course, the case is differen when a *passenger*—*i.e.*, a person to whom a ticket has been issued—

is damnified by the failure to stop. He has contractual rights based on the announcement that the car will stop at certain places, and breach of the promise to do so, in the absence of reasonable excuse may give him an action for breach of contract—*The Law Journal.*

CONTEMPORARY LEGAL LITERATURE.

The Lawyer of Fifty Years ago and the Lawyer of to-day :— The *Green Bag* for February, 1912, contains articles which should interest us—lawyers in India—very much. There is a very interesting paper headed "THE LAWYER OF FIFTY YEARS AGO AND THE LAWYER OF TO-DAY" (in America) from the pen of William L. Marbury of the Baltimore Bar, delivered in his capacity as President of the Maryland State Bar Association in June 1911. The learned President concludes that the lawyer of to-day (in America) occupies an inferior position in the estimation of the public than he did fifty years ago—mainly on account of the financial and business activities he has developed of late in that country and the consequent want of full-hearted attention to the practising side of law. He describes the lawyer who has so drifted into business connections and associations thus "* * He becomes financially interested in their enterprises, and active in all their business counsels. A lawyer of this kind may be engaged for days in his office or in the office of his business associates in discussing matters and handling affairs quite remote from the law. He may pass long periods of time without ever looking at a law book or considering a legal question. In other words, he becomes absorbed in business ; his best energies are required for the conduct of that business. Very frequently large financial interests are at stake, and when in the midst of one of these business operations he is suddenly called upon to go into court, he is frequently not in a fit condition to do so. If he did go, he would have to go with a jaded and distracted mind, and without any such preparation as is necessary to fit him for the discharge of the functions of an advocate and aid to the court in the administation of justice." The writer consequently pleads for the separation of the business lawyer from the trial lawyer—for the creation or development of a system under which the profession will be divided into two classes, the business lawyer and the trial lawyer, with statutes or better, rules of court, prescribing

the functions of each class, having every lawyer free to enrol himself in the class he prefers, but absolutely prohibiting a member of one class from undertaking any of the duties of the other.

The adjournment of cases :—The same writer has some very interesting observations regarding the adjournment of cases for the convenience of counsel and the consequent delay in the administration of justice, which it may perhapsbe well we quote here *in extenso*, having regard especially to the same question being brought home to us on many an occasion in places where more than one court sits for the administration of justice and sometimes in connection with applications for adjournment of cases by practitioners on account of their moffusil engagements :—ED.]

" But there is another and perhaps graver evil which results in the cities from our American practice of attempting to unite the functions of the business lawyer and the trial lawyer, of the solicitor and the barrister, in the same person, and that evil is *delay*.

As a result of nearly thirty years of observation and experience in the trial of causes, I am persuaded that, so far as the state of Maryland, at any rate, is concerned, at least one-half and perhaps a much larger percentage of the delay in the administration of justice is due to postponements granted for the convenience of counsel.

These delays are necessarily incident to our system. The vast majority of them are in nowise attributable to any evil motives or unworthy character in the counsel for whose benefit they are granted.

Not many years ago there died in the city of Baltimore one of the most accomplished lawyers and one of the highest men who graced the Maryland bar, or for that matter, the bar of any other state or country; and yet during a certain period of his life there was current at the Baltimore bar the saying of some irreverent wag that the employment of this gentleman by the defendant in any suit in the courts of Maryland was " equivalent to the obtention of an injunction without bond." His engagements were very numerous, his health was precarious; and when

a case in which he appeared was called for trial, the chances were about five to one that it would have to be postponed because of his being engaged in the trial of a case elsewhere, or because of indisposition, as he was a frequent sufferer from throat trouble at that time. I mention this case only because it is most conspicuous and illustrative.

Every lawyer, however, who pauses to reflect, will, I think, agree with me on this point. What is the experience as regards this matter of the average litigant in our courts? He no longer has to wait any great length of time before his case is first called for trial. A few years ago the dockets of our courts were much congested, and sometimes twelve months or even eighteen months might elapse between the institution of a suit and the time that it was reached for trial on the docket. That condition, however, has been completely remedied by the increase in the number of judges, together with certain well known changes and improvements in the practice of the courts. After the case has once been tried and decided by law there is very little delay in the appellate court. Our Court of Appeals holds three terms during the year, and almost invariably disposes of every case on the docket before adjourning for the term. So far as that court is concerned we have "justice speedily and without delay."

It is in the bringing of the cause to trial in the court of first instance that he meets with delay in its most intolerable form. Suppose we take for illustration a typical case, familiar to us all.

A merchant brings a suit in one of the courts of Baltimore upon a promissory note. The defendant pleads the statute of limitations. The merchant relies upon a new promise. The case is called for trial within a very reasonable time after its institution. The merchant is on hand with his counsel and his witnesses. The witnesses are business men who are attending the trial at some inconvenience, but who would have no objection whatever to devoting a reasonable amount of their time to aid their friend, the plaintiff, in his effort to collect his debt. But instead of the case being tried, this is what happens: the defendant happens to have as his counsel a lawyer who has a large trial practice. He may be one who is a favorite with the

plaintiffs in damage cases, or he may be one who is counsel for corporations, such as liability insurance companies, so-called, who has many cases on the dockets of the courts in which he appears for the defendants. In either case, the result is the same. When the court, after calling the case, makes the usual inquiry as to whether the parties are ready for trial the plaintiff promptly answers in the affirmative, but a young man arises on the other side and states that he is from Mr. C's office, and that Mr. C., the counsel for the defendant, is engaged or about to become engaged in the trial of another case in the court at the other end of the hall, and desires that the trial of this case be postponed until the case which he is now trying or about to try shall have been concluded.

In the English court such an application would not be considered for a moment. The defendant would be told that the rules of practice did not permit the postponement of trials to suit the convenience of counsel; that the defendant must have other counsel ready to take Mr. C's place, or let the trial proceed under the management of the junior. The judge, being invariably a lawyer of the highest order and ample experience himself, would endeavor to see to it in such cases that the defendant suffered no injustice, even if he had to leave the case to the junior, something which the defendant, however, does not ordinarily do.

But what happens in the Maryland court? The application for postponement is granted as a matter of course. The defendant is entitled to it under the rules of our practice there prevailing. The witnesses who have been in attendance not infrequently for several hours before the case is called are "discharged until further notice." Mr. C. proceeds with the trial of the cause which has been the occasion of the postponement. At the close of that trial counsel for our merchant friend endeavors to bring his case on to trial, but finds it impossible to do so by reason of the fact that another case in the same court is on trial. He waits until the conclusion of that case and then announces his readiness to proceed. Thereupon the young man from Mr. C.'s office arises again, and states to the court that Mr. C. is engaged in the trial of another case, which has come in in the meantime, and asks for a further postponement.

Of course Mr. C. cannot be in two courts at the same time. It is not his fault that these causes conflict, and the witnesses, after having again remained in court for several hours expecting to have the case disposed of, are again discharged.

When the next opportunity to try the merchant's case is presented, Mr. C. is disengaged and announces himself ready for trial; but in the meantime another case in which his own counsel is employed has come on to trial, so that there has to be another postponement on that account. Again the witnesses who have been on hand at great inconvenience to themselves are discharged until further notice. There is hardly any limit to the number of times some things like this may occur in any case under our system, and besides its frequency there is no form of delay which so disgusts and enrages the litigant and brings the administration of the law and legal profession itself into such contempt.

It is almost impossible to exaggerate the injury to the reputation of the bar among business men which results from these causes. From this injury the English bar is absolutely exempt.

There is still another class of delays incident to our American system. Suppose that when a case is about to be reached for trial counsel on one side or the other, or it may be counsel on both sides, have engagements of a business nature out of court. Counsel for the plaintiff goes to the counsel for the defendant and says: "If you force me to try this case tomorrow, I will lose an opportunity to make a large fee." Counsel for the defendant, realizing that he may have occasion in the future to ask similar indulgence, agrees to the postponement. Under our system, delays from this cause are almost inevitable, although not infrequently they are not justifiable on ethical grounds, clients not knowing anything about them. The only protection which the profession can have against injury such as this, is that which would be afforded by a system under which the courts would not allow the trial of causes to be postponed on any such grounds.

BOOK REVIEW.

The Law of Criminal Evidence in British India & its Application: By Jno. V. Ryan, L.L.D., (Bar-at-Law). Published by Messrs. Cambray & Co., 9, Hastings Street, Calcutta.

This book is intended to be a *Vade Mecum* for the Police. The first book deals with the sections of the Evidence Act relating to relevancy of evidence and proof. The second book deals with the sections of Penal Code relating to cognizable offences: and the third deals with the powers of the Police outside the Presidency towns, under Statutes other than the Penal Code.

The author has attempted to give succinctly and in a clear form the principles underlying every section and has carefully analysed the case-law bearing on the different matters and grouped them under proper headings. We feel sure that the book will be of great use to investigating officers and prosecuting Inspectors of the Police department as well as to Practitioners who have constantly to do with Criminal Law.

Acknowledgments.

We beg to acknowledge receipt of the following publications:—

Goodeve's Modern Law of Personal Propeıty by John Herbert Willtams and Williams Morse Crowdy, Barristers-at-Law, Ftfth Edition, 1912. Sweet and Maxwell, Limited. London. Price 20 s.

Allahabad Law Journal for	..	..	..	..	April 1912.
Calcutta Weekly Notes	..	..	..	..	Do.
The Law Journal	..	..	..	..	Do.